BEST AVAILABLE COPY

QUESTION PRESENTED

Should New York Executive Law ("Exec. Law") § 632-a (McKinney 1982 & Supp. 1991), which requires any entity that contracts to pay a criminal for discussion or reenactment of his crime to give all money owed the criminal to the New York State Crime Victims Board for the benefit of the victims of that crime, be declared valid under the First Amendment to the U.S. Constitution, where the law (i) does not directly or substantially burden speech or publication; (ii) serves a compelling interest in ensuring that criminals do not profit from their crimes before their victims have a meaningful opportunity to be compensated for their injury and suffering; (iii) is necessary to serve the state's compelling interest by permitting victims to obtain compensation from the criminals' asset derived from storytelling about their crimes; and (iv) achieves that interest through means that are no broader than necessary and narrowly tailored because they are limited to the statute's objective?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
I. Exec. Law § 632-a	1
A. The Statute	1
B. Legislative History	8
II. Exec. Law § 632-a And *Wiseguy*	10
III. The Administrative Proceedings	13
IV. District Court Proceedings	14
V. District Court Opinion	18
VI. Court of Appeals Decision	19
SUMMARY OF ARGUMENT	20
ARGUMENT	22
EXEC. LAW § 632-a DOES NOT VIOLATE THE FIRST AMENDMENT ON ITS FACE OR AS APPLIED TO *WISEGUY*	22
A. Exec. Law § 632-a Does Not Directly Or Substantially Burden Free Speech Or Publication Since, Under The Statute, Criminals Who Choose To Speak And Entities Who Wish To Disseminate The Criminal's Message Are Not Prohibited From Doing So	22
1. Exec. Law § 632-a Does Not Prevent Criminals From Freely Expressing Their Thoughts And Ideas	23

	PAGE
2. Exec. Law § 632-a Does Not Prohibit The Media From Communicating The Criminal's Message To The Public Or From Profiting From Performing That Function	27
3. Petitioner Has Failed To Produce Any Evidence That Exec. Law § 632-a Prevents Willing Speakers From Expressing Thoughts And Ideas Or The Media From Communicating Their Message To The Public Or That The Statute Will Deter Speech In A Significant Respect	31
B. Exec. Law § 632-a Does Not Single Out Or Impose A Differential Burden On The Press Since The Statute Is Directed At Any Entity That Contracts With A Criminal And It Does Not Prevent Such Entity From Disseminating The Criminal's Message	34
C. Since Exec. Law § 632-a Does Not Limit A Criminal's Speech About His Crime, And Is Justified Without Reference To The Discussion Of The Crime, It Is Neither A Content-Based Nor Speaker-Based Prohibition Or Penalty On Speech	36
D. Exec. Law § 632-a's Minimal Impact On Freedom Of Speech And The Press Is Outweighed By The Substantial State Interest It Promotes	39
E. Exec. Law § 632-a Is Also Necessary To Serve And Narrowly Tailored To Achieve New York's Compelling Interest In Ensuring That Criminals Do Not Profit From Their Crimes Before Their Victims Are Compensated	45
CONCLUSION	50

TABLE OF AUTHORITIES

Cases: PAGE

Austin v. Michigan Chamber of Commerce, ____ U.S. ____, 110 S. Ct. 1391 (1990) 46, 47

Arcara v. Cloud Books Inc., 478 U.S. 697 (1986) 27

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 35, 36, 37

Barrett v. Wojtowicz, 414 N.Y.S.2d 350 (2d Dep't 1979) 6

Branzburg v. Hayes, 408 U.S. 665 (1972)..... 33

Buckley v. Valeo, 424 U.S. 1 (1976) 29

Cammarano v. United States, 358 U.S. 498 (1959) ...25, 27

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 26, 40

Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd on op. below*, 556 N.Y.S.2d 483 (1st Dep't 1990), *aff'd* 1991 WL 70950, ____ N.Y.S.2d ____, ____ N.E.2d ____ (Ct. of Appeals May 7, 1991) .....*passim*

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) 37, 38, 42

Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984) 40

Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968) 23

FCC v. League of Women Voters, 468 U.S. 364 (1984) 38

Fasching v. Kallinger, No. L 069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), *rev'd on other grounds*, 510 A.2d 694 (Super Ct. App. Div. 1986) 24

PAGE

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 38, 46

Fox Film Corp. v. Doyal, 286 U.S. 123 (1932)..... 29

Fuller v. Oregon, 417 U.S. 40 (1974)..... 45

Grosjean v. American Press Co., 297 U.S. 233 (1936) 35

Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539 (1985) 23, 29

Houchins v. KQED, Inc., 438 U.S. 1 (1978)..... 35

In re Bernhard Goetz (New York State Crime Victims Bd.) (March 17, 1988) 43

In re Johnson (Berkowitz), 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979), *aff'd on op. below*, 429 N.Y.S.2d 886 (2d Dep't 1980), *lv. to appeal denied*, 433 N.Y.S.2d 426, 413 N.E.2d 365 (1980) 8

Landau v. Vallen, 895 F.2d 888 (2d Cir. 1990) 40, 41

Leathers v. Medlock, 59 U.S.L.W. 4281 (April 16, 1991) 34, 35, 36, 37, 38

Lyng v. Int'l Union, 485 U.S. 360 (1988) 25

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 34

Meyer v. Grant, 486 U.S. 414 (1988) 29, 30

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 34, 35, 36, 46

NAACP v. Button, 371 U.S. 415 (1963)..... 37

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 34

PAGE

New York State Crime Victims Bd. v. Johnsen (Berkowitz) (Sup. Ct. Kings Co. Nov. 24, 1981) 8

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 37

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 37

Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983) 25

Regan v. Time, Inc., 468 U.S. 641 (1984) 37

Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) .. 1, 2

Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984) 30, 34

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 29

Speiser v. Randall, 357 U.S. 513 (1958) 27

St. Martin's Press v. Zweibel, (Sup. Ct. N.Y. Co.), N.Y.L.J., Feb. 26, 1990, p. 25, col. 1 ...26, 27, 38

Texas v. Johnson, 491 U.S. 397 (1989)..... 27

United States v. Albertini, 472 U.S. 675 (1985) 42

United States v. Brown, 744 F.2d 905 (2d Cir. 1984). 45

United States v. Monsanto, 491 U.S. 600 (1989) 46, 49

United States v. O'Brien, 391 U.S. 367 (1968) 21, 22, 27, 39, 40, 42

Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) 30, 46

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....20, 23

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 36, 38, 42

PAGE

Authorities:

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 8, cl. 8 29

U.S. Const. Amend. I .....*passim*

U.S. Const. Amend. XIV 14

UNITED STATES STATUTES

Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C.A. §§ 3681-3682.....10, 45

42 U.S.C. § 1988..... 14

Federal Rules Of Civil Procedure

56 14

56(b)..... 17

NEW YORK STATE STATUTES

Civil Practice Law and Rules ("CPLR")

§ 214(5) 3

§ 215(3) 3

§ 215(8) 3

§ 6201(1) 44

§ 6201(2) 44

§ 6201(3) 44

Estates, Powers & Trusts Law

§ 5-4.1 3

Executive Law

§ 623(5) 4

PAGE

§ 626 4
§ 631 4
§ 632-a ..... *passim*
§ 632-a(1) 2, 3, 13, 28, 36
§ 632-a(2) 3
§ 632-a(3) 3, 7
§ 632-a(4) 7
§ 632-a(7) 3
§ 632-a(8) 4, 7, 11, 13, 43
§ 632-a(9) 3
§ 632-a(10)(b) 2
§ 632-a(11) 4, 7, 43
§ 632-a(11)(c) 7
§ 632-a(11)(d) 7
§ 632-a(11)(e) 7

N.Y. Laws of 1977, ch. 823, *reprinted in* McKinney's 1977 Session Laws of New York pp. 1321-1322 9

N.Y. Laws of 1978, ch. 417, § 1 *reprinted in* McKinney's 1978 Session Laws of New York, pp. 722-723 9, 10

N.Y. Laws of 1981, ch. 445, §§ 2, 3 *reprinted in* McKinney's 1981 Session Laws of New York, pp. 908, 910 10

Penal Law § 60.27 45

NEW YORK STATE REGULATIONS

9 NYCRR 526.1 13

Other Authorities

Assembly Bill Memorandum Re: A. 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 9

PAGE

B. Cardozo, *The Nature of the Judicial Process* (1921) 2, 40

Comment, *In Cold Type: Statutory Approaches To The Problem Of The Offender As Author*, 71 J. Crim. L. & Criminology 225 (1980) 6, 25

Considering the Victim (J. Hudson & B. Galaway eds. 1975) 5

N. Emmons, *Manson: In His Own Words* (1986) 31

H. Franklin, *Prison Literature in America* (1989)..... 32

H.R. Rep. No. 2222, 60th Cong. 2d Sess. (1909)..... 29

Israel, *Jack Henry Abbott, American Prison Writing, And The Experience of Punishment*, 10 Crim. Just. & Behav. 441 (1983)..... 32, 33

A. Karman, *Crime Victims: An Introduction To Victimology*, (1984) 5

L.D. Klausner, *Son of Sam* (1981)..... 8

Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 Geo. Wash. L. Rev. 446 (1973) 4

Lieberman and Stewart, *Making Money Off Murder*, Student Law. (Feb. 1982) 32

Linden, *The Report of the Osgoode Hall Study On Compensation For Victims of Crime* (1968)..... 4

Linden, *Victims of Crime and Tort Law*, 12 Can. B.J. 17 (1969) 4, 5

R. Meiners, *Victim Compensation* (1978) 5

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 New York State Legislative Annual 267.... 8, 9

PAGE

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1978 New York State Legislative Annual 243.... 9

Memorandum of Senator Ralph J. Marino, *reprinted in* 1981 New York State Legislative Annual 247.... 10

Note, *Alabama's Anti-Profit Statute: A Recent Trend In Victim Compensation*, 33 Ala. L. Rev. 109 (1981) 4

Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To The Problem*, 68 Cornell L. Rev. 686 (1983)..... 5

Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353 (1988) 8, 15, 33

Project, *Congress Opens A Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, 52 Fordham L. Rev. 507 (1984) . 5, 45

R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility* (1979)..... 5

Report of the President's Commission on Crime in the District of Columbia (1966) 4

Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crimes*, 10 St. Louis Univ. L.J. 238 (1965) 5

Snider, *COMING SOON to a Theater Near You*, 7 Cal. Law. 29 (1987).....31, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1059

SIMON & SCHUSTER, INC.,

Petitioner,

—against—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

I. Exec. Law § 632-a

A. The Statute

New York has long recognized the common law maxim that no person shall be permitted to profit by his own wrongdoing. In *Riggs v. Palmer*, 115 N.Y. 506, 511-512, 22 N.E. 188, 190 (1889), the New York Court of Appeals stated: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong. . . . These maxims are dictated by public policy, have their foundation in universal law

administered in all civilized countries, and have nowhere been superseded by statutes." Justice Cardozo later explained the reasoning underlying the decision in *Riggs*:

> That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting principles were there in competition for the mastery. . . . There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed. . . .

B. Cardozo, *The Nature of the Judicial Process* 40-41 (1921).

Almost ninety years after *Riggs* was decided, New York enacted a statute, Exec. Law § 632-a,[1] entitled "Distribution of moneys received as a result of the commission of crime," which applies this equitable principle to criminals who profit from selling the story of their crime. Exec. Law § 632-a(1) requires that any entity[2] that contracts with a criminal[3]

---

1 The statute is reproduced in the Appendix to the Petition for A Writ of Certiorari at pages 55a-58a. "_____a" refers to the Appendix to the Petition for A Writ of Certiorari, dated December 1990. "JA _____" refers to the Joint Appendix in this Court.

2 The statute applies to "[e]very person, firm, corporation, partnership, association or other legal entity. . . ." that contracts with a criminal or the representative or assignee of a criminal. Exec. Law § 632-a(1).

3 The statute defines "criminal" as a person accused or convicted of a crime committed in New York as well as a person who voluntarily and intelligently admits committing a crime. Exec. Law §§ 632-a(1), (10)(b). If the charges against an accused person are dismissed or if the person is acquitted, he is entitled to return of any money received by the Board. Exec. Law § 632-a(3).

regarding the reenactment or discussion[4] of a crime committed by the criminal turn over to the New York State Crime Victims Board (the "Board"), an executive agency charged with enforcing the statute, a copy of the contract and the money owing to the criminal under the contract. The Board then holds the money in an escrow account for five years, and, during that time, the crime victim or the crime victim's estate can bring a civil lawsuit against the criminal. The lawsuit is not barred by the expiration of the regular statute of limitations for a tort or wrongful death action[5] because section 632-a creates a new *in rem* cause of action with its own five year statute of limitations which commences when the escrow account is established. Exec. Law § 632-a(7).

The Board is required to publicize in newspapers of general circulation the availability of the money in the escrow account to satisfy any judgments obtained by victims of the crime (Exec. Law § 632-a(2)) and then to satisfy any judgments out of the escrow account. Exec. Law § 632-a(1).[6] The

4 The statute applies to the reenactment of a crime "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind," or from the expression of the criminal's "thoughts, feelings, opinions or emotions regarding such crime, . . ." Exec. Law § 632-a(1).

5 *See*, New York Civil Practice Law and Rules ("CPLR") §§ 214(5), 215(3) and 215(8) (McKinney 1990); New York Estates, Powers & Trust Law ("EPTL") § 5-4.1 (McKinney 1981 & Supp. 1991).

6 The statute also prohibits criminals from transferring their legal interest in the profits to other entities. Exec. Law § 632-a(9) prohibits any action taken by a criminal "by way of execution of a power of attorney, creation of corporate entities or otherwise" that defeats the purpose of the statute. This provision was recently applied to invalidate Jean Harris's attempt to assign a portion of her profits from the book *Stranger in Two Worlds* to a foundation, Children of Bedford, Inc., that she helped establish. *Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894, 898 (Sup. Ct. N.Y. Co. 1989), *aff'd on op. below*, 556 N.Y.S.2d 483 (1st Dep't 1990), *aff'd*, 1991 WL 70950, _____ N.Y.S.2d _____, _____ N.E.2d _____ (Ct. of Appeals

victim is entitled to the money in the account even if the entity never produces the work as long as the payments are owed to the criminal under the contract. The money in the escrow account is distributed in accordance with priorities set forth in the statute to ensure that the victims are paid before the criminal as well as before other judgment creditors, except that a small percentage of the account is available to the criminal to pay legal fees in his criminal case and to a representative who assisted the criminal in producing the criminal's speech, and the state is reimbursed for any money it paid the victims under Exec. Law, Article 22, New York's general victim compensation scheme, but not to exceed one-half of the victim's judgment.[7] Exec. Law §§ 632-a(8), (11).

New York's statute attempts to redress the unfairness of criminals profiting from their crime story before their victims are compensated for their injury and suffering. The special procedures in the statute are designed to remedy the unique problems faced by victims of publicized crimes. Most crime victims do not sue criminals for their injuries and suffering because the criminal usually does not have any significant assets from which a civil judgment may be satisfied.[8] Even

May 7, 1991). *See generally*, Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 Ala. L. Rev. 109, 114 and n.23 (1981).

7 Under Article 22, crime victims may apply to the Board for compensation, within certain limits, for medical expenses, essential personal property lost, damaged or destroyed as a direct result of a crime, occupational therapy or similar rehabilitative services, lost earnings and burial expenses. Exec. Law §§ 623(5), 626, 631.

8 *See* Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Crime* 21 (1968), cited in Lamborn, *The Propriety of Governmental Compensation of Victims of Crime* ["Lamborn, *Govt. Comp.*"], 41 Geo. Wash. L. Rev. 446, 451 n.20 (1973) ("Only 15 percent of the victims even consider suing; five percent consult a lawyer. Slightly fewer actually try to collect, and only two percent collect anything."); *Report of the President's Commission on Crime in the District of Columbia* 130 (1966) cited in Lamborn, *Govt. Comp.* at 453 n.32. *See also* Linden, *Victims of*

"[i]f the defendant does have money or property at the time of the offense, it is quickly exhausted on bail and/or legal expenses."[9] If an entity desires to pay a particular criminal to sell the rights to his crime story, the criminal may profit considerably from the contract which is usually the criminal's only significant asset.[10] Unfortunately, the victims of that crime may not be able to recover for their injury and suffering from this asset because these profits may be acquired many years after the crime or conviction took place and, therefore, after the tort and wrongful death action statute of

Crime and Tort Law, 12 Can. B. J. 17 (1969), reprinted in *Considering The Victim*, 238 (J. Hudson & B. Galaway eds. 1975) (discussing Osgoode Hall study); R. Reiff, *The Invisible Victim: The Criminal Justice System's Forgotten Responsibility* 137 (1979); R. Meiners, *Victim Compensation* 3 (1978); Project, *Congress Opens A Pandora's Box—The Restitution Provisions of the Victim and Witness Protection Act of 1982*, ["Project, *Restitution Provisions of the VWPA*"], 52 Fordham L. Rev. 507, 568-69 (1984), citing Bureau of Justice Statistics, U.S. Dep't of Justice Sourcebook of Criminal Justice Statistics, 364 (1982).

9 Schultz, *The Violated: A Proposal To Compensate Victims Of Violent Crime*, ["Schultz, *The Violated*"], 10 St. Louis Univ. L. J. 238, 243 (1965); *see also* A. Karman, *Crime Victims: An Introduction to Victimology* 193 (1984).

10 For example, Henry Hill had already been paid almost $100,000 for the rights to his story at the time the Board learned of the contract for *Wiseguy*. *See* discussion *infra* at p. 12. It was also reported that John Walker, who confessed to espionage, expected to earn more than a million dollars from the book and movie rights for the story of his 18 years of espionage. *Justice Dept. May Move to Bar Book Profits for Spies*, L.A. Daily Journal, July 11, 1986 at 3. *See also Checkbook Journalism*, Newsweek, Dec. 29, 1969, at 45-46 (discussing six figure sum paid to Susan Atkins for a jailhouse interview of her involvement in the murder of actress Sharon Tate and others while she was still charged with the crime); *Marching to Emporia*, L.A. Times, Aug. 10, 1986, (Calendar), at 20 (discussing six figure sum believed to have been paid by television producer to the Rev. Thomas Bird, who was convicted of murdering his wife, and to Lorna Anderson, who, along with Bird, was convicted of plotting the murder of Anderson's husband); *see generally* Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response To The Problem*, 68 Cornell L. Rev. 686 n.2, 687 n.4 (1983) (discussing books, articles and movies in which publishers paid large sums of money to criminals to acquire publication rights to their criminal story).

limitations have run.[11] Even if the statutes of limitations have not run, unless the victims can succeed in attaching the criminal's profits before obtaining a civil judgment, the assets may be dissipated or some other judgment creditor may satisfy his outstanding judgment before the victims obtain their judgment.

Therefore, without the special procedural protections in New York's statute, a criminal could be paid a large sum of money for selling the story of his crime while his victims would be left without any meaningful remedy to recover for their injury and suffering. Recognizing the inequity in this situation, the New York courts rejected a challenge to the special statute of limitations provision by a criminal profiting from a movie contract whose victim had failed to sue the criminal within the ordinary statute of limitations period:

> Clearly, it is not for lack of merit that the victim of a crime does not at once sue for the tortious injury. In fact the criminal conviction would be conclusive proof of most of the elements necessary to recover on an analogous claim in tort. The obvious reason that a victim ordinarily withholds suit is that he believes that the defendant is indigent, so that the expenditure of the time and money involved in a civil litigation would be of no avail. . . . It would be ironic to hold that a victim who may have been killed, maimed or otherwise injured is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries.

Barrett v. Wojtowicz, 414 N.Y.S.2d 350, 356-357 (2d Dep't 1979).

While the statute attaches the criminal's profits for the sake of victims, as the publication of *Wiseguy* demonstrates, it does not prohibit a criminal from speaking about his crime

---

11 *See* Comment, *In Cold Type: Statutory Approaches To The Problem Of The Offender As Author* ["Comment, *In Cold Type*"], 71 J. Crim. L. & Criminology 255, 267 (1980) (discussing criminals' cooperation in 1977 book and 1978 film concerning the $1.5 million robbery of the Boston office of Brink's Inc. that took place in 1950).

nor does it prohibit a publisher from publishing the criminal's reenactment or discussion of the crime. Moreover, the statute does not require a publisher to forfeit his profits or to edit discussion of a crime from a book.

Although the statute may affect an incentive to speak for those criminals who insist upon being paid immediately to tell the story of their crime, New York's statute contains a number of provisions to encourage criminals to speak about their crimes. First, the statute allows the criminal to receive a portion of the escrowed money to pay legal fees in his criminal case, thereby permitting him, if he has insufficient assets, to afford private counsel. Exec. Law § 632-a(8). Second, a representative of the criminal, such as a literary agent, may obtain his fee (customarily ten percent) in assisting the criminal to produce the work. *Id.* This provision encourages representatives to assist the criminal in selling his crime story and aids compensation for victims. Third, the criminal who wishes to financially repay his victims can assist his victims by selling (and telling) the rights to his crime story because, under this statute, the victims' judgments take *priority* over the unsatisfied judgments of other creditors, including state and local government tax authorities, who are also not entitled to the benefit of the special statute of limitations provision. Exec. Law §§ 632-a(11), (c), (d). Fourth, a person accused of a crime who wishes to proclaim his innocence and be paid for doing so is entitled to have all money returned if he is acquitted or the charges are dismissed. Exec. Law § 632-a(3).[12] Finally, the criminal is entitled to all money remaining in the escrow account after victims' judgments, and any other creditors' judgments, are satisfied. Exec. Law §§ 632-a(4), (11)(e).

---

12 *See Welch Says His Lawyer Will Take Legal Fees From Potential Book Profits*, Wash. Post, March 29, 1981 at A9 (discussing interviews accused murderer Bernard Welch gave professing his innocence); *Checkbook Journalism*, Newsweek, Dec. 29, 1969 at 45 (discussing interview given by Susan Atkins, then charged with murdering Sharon Tate and others, in which she maintained that she acted in self-defense).

B. Legislative History

New York's statute was passed after it was reported that a serial murderer, called Son of Sam, was being offered money for selling the rights to his story. (The statute is, therefore, commonly referred to as the "Son of Sam" law). "McGraw-Hill Book Company later bought the rights to Berkowitz's [Son of Sam's] story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, [10 percent to the literary agent] and $75,000 to Berkowitz through his court-appointed conservator Doris Johnsen." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality* ["Okuda, *Criminal Antiprofit Laws*"], 76 Calif. L. Rev. 1353, 1354 (1988) (citation omitted).[13]

As the author of the bill noted:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured—while five people are dead, other people

13 On October 31, 1977, a conservator was appointed by the New York Supreme Court to manage and preserve David Berkowitz's assets. *See In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979), *aff'd on op. below*, 429 N.Y.S.2d 886 (2d Dep't 1980), *lv. to appeal denied*, 433 N.Y.S.2d 426, 413 N.E.2d 365 (1980). "The primary purpose for the appointment of the conservator was to generate funds for the victims of [Berkowitz's] crimes. This was to be done by capitalizing on the public interest in crimes of violence through the publication of books, movies, etc." *New York State Crime Victims Board v. Johnsen (Berkowitz)*, (Sup. Ct. Kings Co. Nov. 24, 1981). Berkowitz requested that all of the proceeds from any movie or book go to the Board for the benefit of his victims. JA 111. The book, *Son of Sam*, authored by Lawrence D. Klausner, was published in 1981 by McGraw-Hill Book Company. The author notes that "[H]alf of my royalties—the money David Berkowitz would receive—will go to repay, as much as money can repay, survivors of Berkowitz's attacks and the families of those who did not." *Son of Sam*, p. 8. In a decision issued in August, 1987, the court granted the conservator's motion to settle the final accounting of the $118,433.36 fund consisting of Berkowitz's share of royalties from the book *Son of Sam* by Klausner and fees he received for interviews. The money was distributed, in accordance with a settlement agreement, to twelve of his victims or their estates, with the largest distribution of $45,000 going to a victim who was shot in the spine and paralyzed. *In re Johnsen*, (Sup. Ct. Kings Co.), N.Y.L.J., Sept. 2, 1987 at 1, col. 3, and at 15, col. 3.

> were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the *victim must be more important than the criminal.*

Memorandum of Senator Emanuel R. Gold, *reprinted in* 1977 New York State Legislative Annual 267 (emphasis added).[14]

The legislative history makes clear that the overriding purpose of the bill is to protect the rights of victims of publicized crimes to receive compensation *before* the criminal is paid for telling the story of his crime:

> Currently, a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.* The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *quoted* at 916 F.2d at 782 (14a) and *reprinted in* Legislative Bill Jacket, N.Y. Laws of 1977, ch. 823 (emphasis added).

Exec. Law § 632-a was signed by the Governor and enacted into law on August 11, 1977. N.Y. Laws of 1977, ch. 823, *reprinted in* McKinney's 1977 Session Laws of New York, pp. 1321-1322. The statute has been amended several times to strengthen its scope, expand its coverage and set forth priorities for paying out the money in the escrow account.[15]

14 *See Criminals' Revenues from Stories Curbed*, N.Y. Times, Aug. 13, 1977, at 20, col. 3 (sponsor of the New York bill stated "he developed the bill after reading a newspaper account during the hunt for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house to get him to sign a contract' "; *see also 'Son of Sam' Case Poses Thorny Issues for Press*, N.Y. Times, Aug. 22, 1977, at 1, col. 1 (discussing ethical problems posed for press by coverage of killings and alleged $50,000 to $100,000 requested for taped interview with Berkowitz).

15 *See* Memorandum of Senator Emanuel R. Gold, *reprinted in* 1978 New York State Legislative Annual 243; N.Y. Laws of 1978, ch. 417,

Other states have adopted similar laws. In the past 14 years, 42 states and the federal government have enacted statutes modeled after New York's law.[16]

II. Exec. Law § 632-a And *Wiseguy*

Henry Hill was arrested in April 1980 and charged with six counts of conspiracy to sell drugs. JA 50, ¶ 1. In May 1980, Hill entered the Federal Witness Protection Program in

reprinted in McKinney's 1978 Session Laws of New York, pp. 722-723; Memorandum of Senator Ralph J. Marino, *reprinted in* 1981 New York State Legislative Annual 247; N.Y. Laws of 1981, ch. 445 §§ 2, 3, *reprinted in* McKinney's 1981 Session Laws of New York, pp. 908-910.

16 The state statutes are: Ala. Code §§ 41-9-80 to 84 (1982); Alaska Stat. § 12.61.020 (1990); Ariz. Rev. Stat. Ann. § 13-4202 (1989); Ark. Stat. Ann. § 16-90-308 (1989); Cal. Civ. Code § 2225 (West Supp. 1991); Colo. Rev. Stat. §§ 24-4.1-201 to 207 (1988 and Supp. 1990); Conn. Gen. Stat. Ann. § 54-218 (West 1985); Del. Code Ann. tit. 11, §§ 9101 to 9106 (1987 & Supp. 1990); Fla. Sta. Ann. § 944.512 (West 1985 & Supp. 1990); Ga. Code Ann. §§ 17-14-30 to 32 (1990); Haw. Rev. Stat. §§ 351-81 to 88 (Supp. 1989); Idaho Code § 19-5301 (1987); Ill. Ann. Stat. ch. 70, ¶ 411 (Smith-Hurd 1989 & Supp. 1990); Ind. Code Ann. §§ 16-7-3.7-1 to 6 (Burns 1990); Iowa Code Ann. § 910.15 (West Supp. 1991); Kan. Stat. Ann. §§ 74-7319 to 7321 (Supp. 1989); Ky. Rev. Stat. Ann. § 346.165 (Bobbs-Merrill 1983); La. Rev. Stat. Ann. §§ 46:1831 to 1839 (West 1982); Md. Ann. Code Art. 27, § 764 (1988); Mass. Gen. Laws Ann. ch. 258A, § 8 (West 1989); Mich. Comp. Laws Ann. § 780.768 (West Supp. 1990); Minn. Stat. Ann. § 611A.68 (West 1987 & Supp. 1991); Miss. Code Ann. §§ 99-38-1 to 11 (Supp. 1990); Mo. Ann. Stat. § 595.045(14) (Vernon Supp. 1991); Mont. Code Ann. § 53-9-104 (1)(d) (1989); Neb. Rev. Stat. §§ 81-1836 to 1842 (1987); Nev. Rev. Stat. § 217.265 (1986); N.J. Stat. Ann. §§ 52:4B-26-33 (West 1986); N.M. Stat. Ann. § 31-22-22 (Supp. 1990); Ohio Rev. Code Ann. §§ 2969.01 to 2969.06 (1987); Okla. Stat. Ann. tit. 22, § 17 (1991); Or. Rev. Stat. § 147.275 (1989); Pa. Stat. Ann. tit. 71, § 180-7.18 (Purdon 1990); R.I. Gen. Laws §§ 12-25.1-1 to 12 (Supp. 1990); S. C. Code Ann. §§ 15-59-40 to 80 (Law. Co-op. Supp. 1990); S.D. Cod. Laws Ann. § 23A-28A-1 (1988); Tenn. Code Ann. §§ 29-13-201 to 208 (1990); Tex. Rev. Civ. Stat. Ann. art. 8309-1 §§ 16 to 18 (Vernon 1991); Va. Code §§ 19.2-368.19 to .22 (1990); Wash. Rev. Code Ann. §§ 7.68.200 to .280 (Supp. 1991); Wis. Stat. Ann. § 949.165 (West 1990); Wyo. Stat. § 1-40-112(d)-(g) (1988). The federal government's statute is Special Forfeiture of Collateral Profits of Crime Act, 18 U.S.C.A. §§ 3681-3682 (West Supp. 1991).

exchange for his agreement to cooperate with various law enforcement agencies involved in investigating, among other crimes, the six million dollar Lufthansa Airlines theft at Kennedy International Airport. *Id.*, ¶ 2.

In 1981, Hill asked his attorney Robert Simels for assistance in finding someone to write his life story. JA 116, ¶ 7. Simels contacted Sterling Lord, a literary agent, who suggested that a book about the inner workings of organized crime could be "meaningful and successful" and arranged for Simels to speak with Nicholas Pileggi, an established writer and a client of Lord's agency. *Id.*, ¶¶ 7, 8. After Lord was advised that Hill and Pileggi wanted to work together to prepare and write such a book, Lord contacted Michael Korda, Editor-in-Chief of Simon & Schuster "to attempt to interest Simon & Schuster in the book . . . ." *Id.*, ¶ 9. Simon & Schuster subsequently advised Lord that it desired to acquire publication rights in the book. *Id.*[17]

On August 21, 1981, Hill and Pileggi signed an agreement to, *inter alia*, cooperate with each other in the preparation and sale of a book-length manuscript concerning Hill's life and to divide all money received in the sale of the book and any performance rights according to specified percentages. JA 83-85. On September 1, 1981, Simon & Schuster, Hill and Pileggi entered into a standard publishing agreement by which Hill and Pileggi (called the "Author") sold exclusive publishing rights to a work denominated as an "Untitled Autobiographical Non-Fiction about the Mafia." JA 56-82.

The publishing agreement provided that the Publisher shall pay the Author an advance and royalties in several stages.

17 The events surrounding the publication of *Wiseguy* are based on an affidavit sworn to on December 4, 1987 by Lord and submitted by him to the Board in support of his application under Exec. Law § 632-a(8) to obtain his agency's ten percent commission fee. JA 115-118. However, in this proceeding, petitioners' affiants explain very differently the manner in which the publication of *Wiseguy* came about. *Compare* Petitioner's Brief ("Pet. Br.") at 6-7; *see* Korda aff. ¶¶ 4-6, JA 18-19. This dispute was identified by respondents in their district court papers. JA 107-108, ¶ 39. The lower courts did not attempt to resolve the inconsistencies in the differing versions provided by petitioner's affiants as to how *Wiseguy* was commissioned.

JA 56-57. According to the publishing agreement, Hill could receive and retain all his advances and royalties only if the manuscript was delivered in a timely fashion (unless the Publisher agreed to extend the date), JA 71, ¶ 78(a),[18] and the Publisher, in its sole editorial judgment, determined that the work was satisfactory. JA 72, ¶ 78(b).

Wiseguy: *Life In A Mafia Family*, was published in 1985. JA 51, ¶ 10. The story dates from 1955 when, at the age of eleven, Hill became involved in organized crime. *Id.*, ¶ 11. In *Wiseguy*, Hill describes in great detail "countless . . . infamous crimes," he committed as well as those he helped others to commit. JA 4, ¶ 12. Later the book became the basis for the motion picture entitled "Goodfellas".

In January 1986, the Board learned for the first time of the contract between Simon & Schuster, Pileggi and Hill for the publication of *Wiseguy*. JA 51, ¶ 12. The Board's counsel advised Simon & Schuster and Pileggi that they may have contracted with a criminal. He requested a copy of all contracts and other relevant information which are subject to the statute and asked that payments on any contracts which may be covered by the law be suspended. JA 86-87. After discussions, the Board's request was narrowed to matters involving *Wiseguy*. JA 15, ¶ 8.[19] On May 22, 1986, in response to a subpoena issued by the Board, Simon & Schuster furnished the Board with relevant documents concerning *Wiseguy* and advised the Board that it had paid the Sterling Lord Agency on behalf of Hill advances and royalties of $96,250. JA 90-91. Simon & Schuster also agreed to the Board's request to suspend future payments of all sums due Hill (JA 15, ¶ 8), including $27,958 being held at the time. JA 52, ¶ 16.

---

18 Lord requested and received from the Publisher an extension of time to deliver the completed manuscript, first to June 1, 1983 and then to January 31, 1984. (Court of Appeals Appendix (["CA App."] 170-171)

19 The Board's initial request sought material beyond *Wiseguy* because the Board was concerned that Simon & Schuster was disregarding the statute. Petitioner attacks the Board's "sweeping demand" made by letter but fails to point out that the request was narrowed to matters involving *Wiseguy* and that Simon & Schuster complied with this narrow request only after a narrowly drawn subpoena was issued by the Board. *Compare* Pet. Br. at 8-9.

III. The Administrative Proceedings

After reviewing the contract and related documents and the book, the Board issued a Proposed Determination and Order, dated May 21, 1987, finding that the contract and book are covered by Exec. Law § 632-a because *Wiseguy* contains Hill's admissions to involvement in various crimes as well as Hill's discussion of those crimes and that Simon & Schuster violated the law by failing to turn over the contract and by paying money to Lord on behalf of Hill. JA 52-53. The Board determined that all money owed to Hill under the contract must be turned over to the Board to be held in escrow for the victims of the crimes committed by Hill. JA 53, ¶ 4. In addition, Hill was ordered to turn over to the Board the money already paid to him under the contract ($96,250 less any agent fees) and Simon & Schuster and the Sterling Lord Agency were ordered, in the event Hill failed to return the money, to turn over the money they wrongfully distributed to Hill. JA 53-54. Pileggi was determined under Exec. Law § 632-a(1) to be a co-author and not a representative of Hill and, therefore, he was entitled to retain all of the proceeds due him under the contract. JA 53, ¶ 3.

Under the Board's rules, 9 New York Code of Rules and Regulations ("NYCRR") 526.1, all parties had thirty days to request a hearing and to submit objections to the Proposed Determination and Order. JA 49; 101, ¶ 10. Simon & Schuster and Hill did not object. JA 106, ¶ 35; *see also* JA 15, ¶ 9. Hill's literary agent, Lord, objected and sought, pursuant to Exec. Law § 632-a(8), to retain his ten percent literary fee as provided for in the agreement. JA 106, ¶ 34. On October 19, 1988, the Board issued its Final Determination and Order and granted the literary agent's application. The Board's determination with respect to Simon & Schuster and Hill also became final at that time. 9 NYCRR 526.1. *Compare* Pet. Br. at 9, n.9. Because of the pendency of this action, the Board has not yet taken custody of any sums.

IV. District Court Proceedings

Petitioner commenced this action on August 3, 1987 seeking an order declaring the statute unconstitutional on its face and as applied under the First and Fourteenth Amendments, an injunction prohibiting respondents from taking any steps to apply or enforce it and an award of costs and attorney's fees pursuant to 42 U.S.C. § 1988. JA 1-9. After respondents answered the complaint, JA 10-11, petitioner moved for summary judgment under Federal Rules of Civil Procedure ("FRCP") 56. JA 12.

In support of its motion, petitioner submitted affidavits by publishing executives, publishing counsels, Pileggi and Lord. The affiants explained that authors and primary sources seek secure promises of timely payment and asserted that the statute therefore discourages speech because it restricts the publishing industry's "common practice" (JA 14, ¶ 7) of directly compensating such persons. JA 13-47. However, the only examples in the record suggesting that criminals may have been discouraged from speaking as a result of the statute are mentioned by Pileggi who states that he has "had to reject three separate projects which I would have undertaken or pursued. . . ." JA 27, ¶ 10; *see also* JA 28, ¶¶ 11-12. Only one affiant, the Editor-in-Chief of Time, Inc., directly mentioned the possible deterrent effect of the statute outside book publishing, but gave no examples showing that the statute had inhibited news magazines from publishing stories about criminals.[20]

A number of the executives stated that they would decline to enter into contracts with criminals in order to avoid the

20 *See* McManus decl. ¶ 3, JA 42 ("[the statute's] scope clearly involves magazine publishers just as substantially. While our regular reporting of alleged criminal activity of course involves no contracts with or payments to alleged criminals, there could arise situations where a full account of the criminal activity or, often more significant, the perspective of the alleged criminal concerning his motivation or the background of his activity can only be obtained by dealing with the individual most directly involved.")

reach of the statute. *See, e.g.*, Korda aff. ¶ 12, JA 21;[21] Grann aff. ¶ 4, JA 45-46. The publishers also complained that the statute may cause them to excise material concerning discussion of crimes from manuscripts in order to avoid interference by the Board with their contracts and payments to criminals. However, only one publisher identified a single instance in which discussion of a crime had been "restrict[ed]."[22] The affiants could not and did not state that the statute prohibits them from publishing books by criminals, compels them to delete material from any manuscript or bars them from earning all of *their* profits, but rather that they have *chosen* to take certain steps to avoid any involvement with the law. Finally, the publishing executives gave examples of books they believe would not have been written if the statute had been in effect when the book was published.[23]

The record does not contain any submission by Hill or any submissions by other criminals stating that they have been unable or unwilling to speak or to cooperate in a project as a result of the statute. Petitioner states tha "Hill was willing

21 Simon & Schuster's Editor-in-Chief stated that he would make it his practice to reject any book that would entangle Simon & Schuster in the statute's net and that he explained to his editorial board that Simon & Schuster could not consider a book on the so-called "preppy murderer" if Robert Chambers would be participating. *Id. Compare* Pet. Br. at 11 ("Simon & Schuster too has in fact rejected certain book projects because the law would apply.") Although Simon & Schuster declined to publish a book if Chambers would be participating, it was reported that Chambers' lawyer received more than 100 offers for movies or television films. *Mass Media Murder Mania*, Wash. Post, Sept. 22, 1986 at C2, col 1; *see also* Brown, *Murder Most Glamorized*, L.A. Times, April 2, 1989, (Calendar), at 18.

22 Grann aff. ¶ 7, JA 47 ("Our caution in the editorial process is illustrated by a recent book by a celebrity who had been convicted of a crime. We felt compelled to severely restrict any discussion of the crime in order to avoid the snare of another state's Son-of-Sam law."); *see also*, McManus aff. ¶ 4, JA 43; Korda aff. ¶¶ 14-15, JA 22; McNamara aff. ¶ 12, JA 16.

23 *See* Korda aff. ¶ 11, JA 21; Lord aff. ¶ 12, JA 32; Hollingsworth aff. ¶ 5, JA 35; Grann decl. ¶ 5, JA 46. *Compare Okuda, Criminal Antiprofit Laws, supra* p. 8, at 1364 and n.71 (discussing books written and published in New York since section 632-a was enacted).

to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the project." Pet. Br. at 7; *see also id.* at 13.[24] However, under the publishing agreement Hill's compensation depended upon Simon & Schuster's acceptance of the manuscript. JA 72, ¶ 78(b). Indeed, it is unclear from the record whether Hill would have refused to cooperate if Simon & Schuster had properly advised him that it must turn over any payments to the Board to be held in escrow. *See* Petromelis aff. ¶¶ 37-46, JA 107-109.[25] As the district court found: "[B]ecause Simon & Schuster failed to comply with section 632-a by presenting its contract with Pileggi and Hill to the Board before making payments to Hill, we will never know whether or not Hill would have cooperated." 724 F. Supp. at 176 (36a [footnote omitted]).[26]

---

24 *See* Korda aff. ¶ 7, JA 19 ("Hill's attorney made it clear that Hill's cooperation was dependant on his being paid for his time and effort."); Pileggi aff. ¶ 5, JA 26 ("Given the substantial investment of time that I required from [Hill], he would not have agreed to assist my work without compensation. He made this plain to me in the negotiations between us about what portion of the book's proceeds would be his.")

25 Hill appeared in 1986 on the ABC TV news program 20/20 to discuss his career in organized crime. JA 123. In 1987, after a Martin Lewis of Redmond, Washington was arrested on drug charges, Lewis' neighbors told reporters that he had bragged for years that he was really Henry Hill of *Wiseguy* fame "and about how rich and famous he is going to be" (JA 119), and, therefore, his arrest came as no surprise to them. JA 108-109, ¶ 40(b); *see also* JA 119-122. Hill also appeared on the television program Inside Edition on October 3, 1990 (*see* Newsday, Oct. 5, 1990, at 8), in which he discussed his crimes and the accuracy with which the film "Goodfellas" depicted his crime family life. The $1200 fee for Hill's television appearance is currently in an escrow account maintained by the Board for the sake of his victims.

26 The court of appeals found that "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." 916 F.2d at 779 (6a). That finding, however, is at odds with the district court's finding which was not in error given the omission of an affidavit by Hill, the three year delay in his receipt of any payments (JA 90) and the evidence submitted by the Board concerning Hill's interest in publicity. *See* Petromelis aff. ¶ 40, JA 108-109; *see also* JA 119-

Respondents cross-moved for summary judgment pursuant to FRCP 56(b). JA 98. In their supporting papers, respondents disputed petitioner's statements that the statute will effectively deter most criminals from cooperating on projects and thereby prevent publishers from publishing works by criminal authors or primary sources. Petromelis aff. ¶¶ 36-38, JA 106-107. The Board's counsel noted that, as of October 27, 1988, there were ten pending administrative proceedings involving the statute. Felegy aff. ¶ 41, JA 137-138.[27]

124; CA App. 233-257. *Compare* Pet. Br. at 2-3 ("Absent those payments, the record shows without contradiction, the book would never have been written.") *See also id.* at 7.

27 As noted above, $118,000 was paid to Berkowitz's victims through his conservator. *See supra* note 13. Apart from the victims of Hill's crimes, the statute has benefited or will soon benefit victims in a number of cases. The Board has established escrow accounts or concluded administrative proceedings based on the following contracts: (1) the movie rights bought by Warner Bros. for the crime story of John Stanley Wojtowicz, the bank robber portrayed in the film "Dog Day Afternoon". *See Book Rights: Ethical Dilemma ["Book Rights"], Nat'l Law J., Aug. 24, 1981, 1, 12, col. 4. $90,000 has been escrowed thus far, and $75,000 has already been distributed to his victims; (2) the rights to the book My Return* by Jack Henry Abbott which includes a play based on his fatal stabbing of an aspiring actor, together with an option for a proposed movie based on Abbott's life, *see* N.Y.L.J., Oct. 22, 1987 at 1, col. 2. Three escrow accounts totaling over $16,000 are available and his victim's widow has obtained a judgment against Abbott; (3) a People magazine article, *The Man Who Shot John Lennon*, written with the assistance of Lennon's killer Mark David Chapman. Over $8,000 is escrowed; (4) a contract for the book *Power on Earth*, by Nick Tosches, written with the assistance of convicted felon Michelle Sindona, concerning his crimes involving the failure of Franklin National Bank—*see Book Set on Sindona, Italian Banker*, N.Y. Times, March 26, 1986 at C15, col. 4. Approximately $15,000 has been escrowed thus far and the Board has been notified of a judgment against Sindona arising from his crimes; and (5) the life story of Jean Harris, entitled *Stranger In Two Worlds*, bought by MacMillan, Inc. The Board's determination that the contract is subject to Exec. Law § 632-a and an advance of $100,000 must be escrowed for the benefit of her victim's estate was upheld in *Children of Bedford*, 1991 WL 70950. In addition, an escrow account was established based on a contract for the television movie rights to the crime story of Salvador Agron, the so-called

The Board's decision to hold money due Hill in escrow under the statute should benefit victims of Hill's crimes. For example, Patricia Eisenberg was married to William Bentvana a/k/a Billy Batts. On or about December 13, 1970, Mr. Bentvana disappeared. After reading *Wiseguy* some fifteen years later, Ms. Eisenberg learned for the first time that her husband had been murdered and that Hill had been an accessory to the murder. Ms. Eisenberg states: "Our sons and I have suffered financially and emotionally from the crime described by Henry Hill in his book, *Wiseguy*. We intend to make a claim individually and on behalf of my husband's estate for monies obtained by the New York Crime Victims Board." Eisenberg aff. ¶ 5, JA 125.

V. District Court Opinion

In its opinion dated October 24, 1989, the district court denied petitioner's motion for summary judgment, granted respondents' cross-motion for summary judgment and declared Exec. Law § 632-a to be constitutional under the First and Fourteenth Amendments. 724 F. Supp. at 180 (45a). At the outset, the court considered whether the statute directly restricts expressive activity or whether its effect on speech and the press is indirect. 724 F. Supp. at 175 (34a-35a). The court observed that freedom of speech "presupposes a willing speaker." *Id.* at 176 (35a). The court wrote: "[A]lthough it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated. *See Children of Bedford*, 541 N.Y.S.2d at 899." *Id.* (36a).

The district court therefore concluded that § 632-a has only an incidental effect on speech activities. *Id.* at 177 (38a).

"Capeman" murderer, but the funds were returned to the criminal, pursuant to Exec. Law § 632-a(4), when no victim claimed the funds. *See Book Rights*, Nat'l. Law J. at 12, col. 4. *Compare* Pet. Br. at 13, n.11 and 31.

Applying the test for incidental limitations on First Amendment freedoms (*id.* at 177-179 [41a-42a]), the court determined that New York's interest in ensuring that criminals do not profit from their crime before their victims have an opportunity to be compensated is substantial and that the interest is unrelated to suppression of expression. The court also concluded that any restriction on speech is no greater than is essential to promote the government's interest in compensating crime victims because the law "is drawn not to prohibit expressive activities but to garnish the proceeds so that they will be used in a productive manner. . . . The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime." *Id.* at 179 (41a-42a).[28]

VI. Court of Appeals Decision

A divided panel of the Second Circuit affirmed the district court's judgment dismissing the complaint (JA 126), but on different grounds. The majority decided that section 632-a must survive strict scrutiny to be found constitutional because "the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes" since "[w]ithout a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write." 916 F.2d at 781 (11a). The majority also found that the statute singles out the media for differential treatment based on expressive content. *Id.* at 782 (12a-13a).

The court of appeals then determined that the state had met its burden of showing that Exec. Law § 632-a is necessary to serve a compelling state interest. The majority found that New York has a compelling interest "in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation

28 The district court also rejected petitioner's contention that the statute violates the due process clause because it is overbroad and vague. The court found that the statute provides fair notice to those to whom it applies and clear standards for compliance. *Id.* at 179-180 (42a-44a). *Petitioner abandoned this claim in its appeal to the Second Circuit.* 916 F.2d at 781 (10a). *See also Children of Bedford*, 1991 WL 70950 at pp. 20-21 (holding section 632-a is not void for vagueness).

by reason of their victimization." *Id.* (13a-14a). The court of appeals further reasoned that the statute is necessary to serve that interest because it "assure[s] that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." *Id.* at 783 (15a).

Finally, the majority determined that the statute is narrowly tailored to achieve the state's compelling interest because it recognizes that the only way a criminal can profit from a specific crime involving a specific victim, apart from obtaining any proceeds of the crime itself, is to tell (and sell) the story of the crime and that the sole asset of most criminals is the right to tell the story of their crimes. *Id.* (15a).[29]

SUMMARY OF ARGUMENT

1. "Freedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Exec. Law § 632-a on its face, and as applied to *Wiseguy*, does not directly or substantially burden free speech since the statute does not prevent a willing criminal from speaking. This statute only interferes with speech when a criminal chooses not to speak in order to avoid the attachment of his profits.

2. Exec. Law § 632-a on its face, and as applied to *Wiseguy*, does not substantially or directly interfere with the media's ability to publish or to make a profit. The media in this case is the means by which the criminal speaks. The statute imposes some minor administrative requirements on entities contracting with criminals but it does not prevent the media from profiting or from disseminating the willing criminal's speech. The fact that criminals are paid for speaking by the media does not change the protections afforded to the press by the First Amendment.

29 The dissenting judge agreed that the statute directly burdens speech and should be held to a heightened standard of review. *Id.* at 784 (19a). However, he concluded that the state's interest in victim compensation was not served by the statute in a manner narrowly tailored to achieve that end because, in his view, the statute was both under and over-inclusive. *Id.* at 785-787 (21a-25a).

3. There is no evidence in this record that willing criminals have been deterred from speaking by this statute. In fact, the record shows that criminals continue to speak about their crimes. Moreover, certain criminals who wish to profit from speaking will continue to speak about their crimes, and the financial incentives in the statute encourage such speech. The statute must therefore be sustained where, as here, petitioner has failed to show that the statute will deter speech in a significant respect.

4. Exec. Law § 632-a does not target the press for differential regulation which burdens its ability to publish. Differential regulation of the press raises substantial First Amendment concerns when the press is targeted in a manner that suggests an effort to suppress publication. This statute does not prevent the press from publishing or from profiting when it disseminates the criminal's message. Moreover, Exec. Law § 632-a is also directed at any entity that contracts with a criminal for speech about his crime, and, therefore, it does not target a special or small segment of the press for differential treatment.

5. Although Exec. Law § 632-a applies only when a criminal is paid money to tell his crime story, the law is content-neutral and not speaker-based because it does not prohibit or limit the criminal's discussion of crimes or the criminal's point of view about them. Section 632-a is also justified without reference to the content of the criminal's speech because its purpose is to ensure that a criminal does not profit from selling his crime story before his victims have a meaningful opportunity to be compensated for their injury and suffering.

6. Because the statute is directed only at a financial incentive to speak and not at speech itself, the statute affects speech only indirectly and in an insubstantial manner. The statute must, therefore, be judged under the standards for incidental burdens on speech set forth in *United States v.*

O'Brien, 391 U.S. 367 (1968). Under the *O'Brien* test, the statute survives scrutiny because (i) New York has the authority to enact a law which attaches the profits of criminals for the benefit of their victims; (ii) the statute furthers New York's substantial interest that criminals not profit from their crimes before their victims are compensated; (iii) New York's interest is unrelated to the suppression of speech; and (iv) the statute is an effective means of allowing victims of crimes publicized in the media to be compensated for their injuries and suffering before the criminal profits from his crime.

7. Even if the statute imposes a direct or substantial burden on speech or the press, Exec. Law § 632-a survives strict scrutiny because it is necessary to achieve New York's compelling interest since it provides the most effective means of ensuring that crime victims are compensated whenever the criminal profits from telling the story of his crime. The statute is also narrowly tailored to achieve New York's compelling interest as it targets only the criminal's profit from his crime and not his speech. The statute is neither under-inclusive nor over-inclusive because "[t]he reach of the law is limited to its purpose." *Children of Bedford*, 1991 WL 70950 at 20.

ARGUMENT

EXEC. LAW § 632-a DOES NOT VIOLATE THE FIRST AMENDMENT ON ITS FACE OR AS APPLIED TO *WISEGUY*

A. Exec. Law § 632-a Does Not Directly Or Substantially Burden Free Speech Or Publication Since, Under The Statute, Criminals Who Choose To Speak And Entities Who Wish To Disseminate The Criminal's Message Are Not Prohibited From Doing So

The First Amendment does not prevent government from enacting a law which may affect a speaker's incentive to speak. Indeed, general tax laws and attachment statutes,

which petitioner concedes are constitutional (*see* Pet. Br. at 28-29 and JA 36, ¶ 9), reduce a speaker's financial incentive to speak. Rather, the First Amendment prohibits government from enacting a law which unduly interferes with a criminal's right to speak, a criminal's means of communicating his message or the public's right to hear the criminal's message. *See generally*, *Virginia State Board of Pharmacy*, 425 U.S. at 756 ("the protection afforded is to the communication, to its source and to its recipients both.") Exec. Law § 632-a does not directly or substantially burden freedom of speech or the press because it does not prevent the criminal from freely and fully expressing his thoughts and ideas or inhibit the media from communicating those thoughts and ideas to the public. In fact, the record demonstrates that, despite the statute, criminal speakers continue to express their point of view about their crimes and the media continues to disseminate the criminal's message.

1. Exec. Law § 632-a Does Not Prevent Criminals From Freely Expressing Their Thoughts And Ideas.

" 'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . .' " *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 559 (1985), *quoting Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255, 296 N.Y.S.2d 771, 778 (1968) (emphasis in original). A law which only affects a person's incentive to speak, however, is not directed at the *voluntary* expression of ideas and does not raise substantial First Amendment concerns unless it is aimed at suppressing speech itself. This is because "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy*, 425 U.S. at 756. A willing speaker is a person who desires to communicate his ideas and beliefs to an audience interested in hearing them. A person who speaks only upon receipt of a financial incentive cannot be considered a voluntary or willing speaker.

Exec. Law § 632-a on its face, and as applied in this case to *Wiseguy*, does not prevent a willing speaker from fully expressing his thoughts and ideas to others. The statute,

> does not prohibit a person convicted or accused of a crime from engaging in conduct designed to communicate the details of the crime or his thoughts and feelings about its commission or about the resulting prosecution and trial. Nor does the law prohibit any segment of the press from functioning as the instrument for the communication of such information to the public or from reaping a financial benefit from performance of that function. The statute affects only the rights of the perpetrator to receive any profit from communications concerning the crime unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer.

Children of Bedford (Sup. Ct. N.Y. Co.), 541 N.Y.S.2d at 898-899.

Thus, the statute interferes with the expression of the criminal's ideas only when the criminal chooses not to speak because his profits will be held in escrow for the benefit of his victims. *See also Fasching v. Kallinger*, No. L 069197-83 (N.J. Super. Ct. Law Div. July 24, 1985), *slip op.* at 33 ("If the criminal wishes to speak to the members of the press, he will speak regardless of any monetary incentives.") (citation omitted).[30] The statute did not interfere with Hill's speech since he cooperated with Pileggi. Even if Hill would not have spoken because he wanted his profits immediately, that decision would have been his to make and not one mandated by the statute.

As one commentator has aptly stated:

---

30 This challenge to the New Jersey Son of Sam statute involved the profits from the book *The Shoemaker*. A lower court upheld the statute under the First Amendment, but an appellate court reversed the lower court's decision on statutory grounds and did not reach the constitutional issue. 510 A.2d 694, 696, 702-704 (Super. Ct. App. Div. 1986). (A copy of the unpublished lower court decision was appended to respondents' brief in the Second Circuit).

> The argument that the [New York] statute[ ] violate[s] the first amendment because [it] deter[s] the offender from publishing the story of his crime centers on the withdrawal of the proceeds as the source of the deterrent effect. This does not, however, allege the affirmative assertion of a barrier to his expression but rather involves the withdrawal of an incentive for him to express himself. The publishers who are willing to pay him for his story would be equally if not more willing to accept his statements free of charge. The payments to the offender induce him to tell his story but do not relate to the willingness of publishers to print it. . . . The argument against these statutes seems to presuppose an *unwilling* speaker who must be induced to communicate by monetary payments.

Comment, *In Cold Type*, *supra* note 11, at 261-262 (emphasis in original).

In several decisions, this Court has recognized that the Constitution does not provide special protections to people who are discouraged from exercising their constitutional right to speak by the government's withdrawal of or refusal to provide a financial incentive to speak which is not aimed at suppressing speech. First, the Court has rejected challenges under the First Amendment to provisions in federal tax laws and government benefit programs that reduced the amount of money people had to spend which in turn could reduce their incentive to fully exercise their First Amendment right to speak. *See Lyng v. Int'l Union*, 485 U.S. 360, 369 (1988) (denial of food stamp benefits to families who apply for such benefits where a member is on strike and denial of an increase in a current recipient family's food stamp allotment when a member goes on strike); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983) (denial of a tax deduction for contributions based upon the nature of an organization's lobbying activities); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (same).

Second, the Court has extended this principle in a challenge to a federal forfeiture statute which restrains a criminal

defendant's money. Specifically, the Court held that orders restraining and then forfeiting a criminal defendant's assets under the Comprehensive Forfeiture Act of 1984 did not substantially burden a criminal defendant's Sixth Amendment right to counsel of choice. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). The Court reasoned that even where assets subject to forfeiture are restrained, a criminal defendant was not necessarily prevented from retaining an attorney of his choosing. *Id.* at 625. The Court specifically recognized that denying an exception to the forfeiture statute for a criminal defendant's right to counsel of his choice would also properly mean that a criminal defendant could not assert a First Amendment exception to the forfeiture statute: "If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal . . . Nonetheless, we are not about to recognize an antiforfeiture exception for the exercise of each such right. . . ." *Id.* at 628.

These decisions illustrate that a law which affects a speaker's financial incentive to speak but does not prevent him from communicating his thoughts and ideas, does not directly or substantially burden speech. *Caplin & Drysdale* demonstrates that this principle applies even where a law *restrains* a person's assets but it does not *prevent* the exercise of the underlying right.

Section 632-a is similar to the laws at issue in these cases since it only attaches a criminal's asset in order to preserve the victim's equitable right to it, but it does not *prevent* a criminal from communicating his thoughts and ideas. In addition, the statute is aimed at the criminal's profits and is not directed at his speech nor does it operate in a manner to suppress speech. *Accord St. Martin's Press v. Zweibel* (Sup. Ct. N.Y. Co.), N.Y.L.J., Feb. 26, 1990, p. 25, cols. 1, 5-6 (involving R. Foster Winan's book *Trading Secrets*) ("Freedom of speech does not guarantee a criminal's right to maximize profits in return for selling his story to the media and

the mere fact that the criminal may not immediately profit from such expressive activity does not prevent such speech.")

Since the statute is only directed at the profits paid by some entity to a criminal speaker under a contract, and is not directed at speech or publication, the statute only burdens the criminal's speech indirectly whenever a criminal chooses not to speak because of the statute. For the reasons discussed above, this indirect burden on speech is also insubstantial. "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend . . . [on protected activities], yet no one would suggest that such liability gives rise to a valid First Amendment claim." *Arcara v. Cloud Books Inc.*, 478 U.S. 697, 706 (1986). Accordingly, the statute must be judged under the balancing test that is set forth in *United States v. O'Brien*, 391 U.S. 367, *see infra* pp. 39-45, for laws which impose an incidental burden on speech.[31]

2. Exec. Law § 632-a Does Not Prohibit The Media From Communicating The Criminal's Message To The Public Or From Profiting From Performing That Function.

The media in this case is the means by which the criminal communicates his message to others, and the media's ability to carry out this function is not infringed by the statute. Once a criminal is willing to have his story disseminated, the statute only interferes with its transmission when the media chooses not to disseminate the criminal's story to avoid any

---

31 The *O'Brien* test would not apply if a law were directed at a speaker's profits for the purpose of suppressing speech. *See, e.g., Cammarano*, 358 U.S. at 498, quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958) ("Nondiscriminatory denial of [tax] deduction is plainly not 'aimed at the suppression of dangerous ideas.' ") In that case, the law would be subject to strict scrutiny review. *Compare Texas v. Johnson*, 491 U.S. 397, 406-407 (1989) (state *interest* must be unrelated to speech to come within purview of *O'Brien*). Here, the interest of section 632-a is unrelated to speech because the statute is directed only at the criminal's profits from his crime in order to assist the victims of his crime.

involvement with the Board or chooses to edit material from a story in order to avoid the reach of the statute. The minor and narrowly circumscribed administrative burdens the statute imposes on all entities that contract with criminals concerning their crime story—the obligation to turn over covered contracts to the Board and to pay money to the Board instead of to the criminal (Exec. Law § 632-a[1])—do not significantly interfere with the media's ability to disseminate the criminal's message. *Accord Children of Bedford*, 1991 WL 70950 at 18-19.

Petitioner argues that Exec. Law § 632-a constitutes a substantial burden on speech and publication because "[s]tatutory restrictions on expenditures for speech" (Pet. Br. at 17) are direct restrictions on speech itself. In petitioner's view, this statute constitutes such a restriction because it is a "prohibition on making payments [by publishers to authors and primary sources] deemed necessary for speech. . . ." *Id.* at 18.

Petitioner's argument does not apply to what in fact occurred to Hill. The statute did not interfere with Simon & Schuster's dissemination of Hill's message since the statute did not prevent petitioner from publishing *Wiseguy*. However, as has been shown above, even if Hill had declined to speak, laws which limit the speaker's financial incentive to speak do not directly or substantially burden the First Amendment.

The fact that the money is owed to the criminal by the *media* does not change the result. The cases petitioner relies upon stand only for the proposition that a statutory restriction on expenditures for speech will directly interfere with speech when it limits or reduces the speaker's *means* of communicating his message to others. When a speaker's means of communication are infringed, the speaker can not fully disseminate his message to his audience. It is the speaker's *message* which the First Amendment protects and his *ability* to convey that message to his audience, *not* the speaker's ability to *maximize his own profits*. The First Amendment does not protect the media's right to convey the speaker's message if

the speaker is unwilling to speak because his financial condition is not being met.[32]

Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) addressed, *inter alia*, the expenditure ceilings in the Federal Election Campaign Act. In striking down these ceilings, the Court recognized "[t]he electorate's increasing dependence on . . . mass media for news and information" so that "virtually every *means* of communicating [political] ideas in today's mass society requires the expenditure of money." *Id.* at 19 (emphasis added). Accordingly, by limiting how much money could be spent in a national campaign, Congress had imposed a *direct* impediment upon the speakers' *means* of communicating their message.

Similarly, in *Meyer v. Grant*, 486 U.S. 414 (1988) (Pet. Br. at 18), Colorado made it a crime for the proponent of an initiative petition to pay petition circulators. The petition circulators were the *means* by which the proponents' ideas were being communicated to the public. If the circulators could not be paid, the proponents' message could be communicated by volunteers, but "the available pool of circulators [was] necessarily smaller if only volunteers can be used." *Id.* at 419. The Court held that "[t]he refusal to permit [the proponents] to pay petition circulators . . . makes it less likely that [the proponents] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.*

---

32 In support of its argument that the restriction of payment for speech necessarily and unconstitutionally restricts speech, petitioner also cites to copyright cases. Pet. Br. at 20, citing, *e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. at 558 ("copyright supplies the economic incentive to create and disseminate ideas.") The Constitution, art. I, § 8, cl. 8 allows Congress to enact a copyright law but does not confer a constitutional right to copyright. *See, e.g.*, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) ("the protection given to copyrights is wholly statutory"). *See also* H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909) ("The Constitution does not establish copyrights . . . .") Moreover, the copyright law protects an author's right to control the use of his expression, but does not protect his profits from taxation or attachment. *See Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (copyright royalties are not immune from state taxation).

at 422-423. In addition, "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424.

In cases involving charities (Pet. Br. at 18-19 and n.15), the Court recognized that charities often use professional fundraisers to disseminate their message as well as solicit funds and that laws that restricted the "amount a charity can spend in fund-raising activity" substantially restricted the charities' *means* of spreading its message and, therefore, were "a direct restriction on protected First Amendment activity. . . ." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. at 967 and n.16, *citing Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 635-636 (1980). For example, in *Joseph H. Munson Co.*, the statute at issue forbade contracts between charities and professional fundraisers if, after allowing for a deduction of costs associated with solicitation, the fundraisers retained more than 25% of the money collected. By preventing certain charities from using fundraisers where their fees were deemed to be unreasonable, the statute inhibited the charities' *means* of communicating their ideas and messages to the public and, therefore, directly interfered with their ability to speak.

In none of the political speech and charitable solicitation cases did the Court address the speaker's incentive to speak through the payment of money. In each case, the Court discussed the impact of the statute on the speaker's *ability* to disseminate his message. Thus, the principles enunciated in these cases do not apply to section 632-a since, under this statute, the press is the means by which the criminal speaks and, by forbidding the press from immediately paying the criminal his profits, the statute does *not* limit the *press's ability* to publish or profit.

3. Petitioner Has Failed To Produce Any Evidence That Exec. Law § 632-a Prevents Willing Speakers From Expressing Thoughts And Ideas Or The Media From Communicating Their Message To The Public Or That The Statute Will Deter Speech In A Significant Respect.

The record in this case does not show that Exec. Law § 632-a has prevented any willing speaker from expressing his thoughts or ideas or any publisher from communicating the criminal's message to the public. Indeed, it could not. The statute is specifically designed to avoid infringing on freedom of speech or the press. In fact, although theoretically some criminals will not speak about their crime if they are not immediately paid, the record in this case does not show that the statute has deterred any criminal from speaking and that it will have a substantial impact on the number of criminal speakers or the content of their speech.

There are many reasons, besides money, which motivate criminals to speak. For example, Charles Manson spent "hundreds of hours" telling his life story and crime story. "And although it is his story, Charles Manson receives no royalties or any other remuneration from [the] book. His only recompense will be the chance to have his story heard." N. Emmons, *Manson: In His Own Words*, 15, 17 (1986). The record suggests that Hill wanted to tell his story and that he might have spoken even if he could not be paid immediately or guaranteed his profits. *See supra* note 25.[33] There are also many other examples of criminals wishing to tell their crime story without regard to their own profit.[34]

---

33 Hill was not even paid his first advance until October 10, 1984 (JA 90), more than three years after the publishing agreement was entered into and he was to receive his first advance (JA 56, ¶ Second [C]), and more than eight months after the extended deadline for delivery of the completed manuscript. CA App. 171.

34 *See e.g.*, Snider, *COMING SOON to a Theater Near You*, 7 Cal. Law. 29, 31-32 (1987) (" 'Accomplished writers spending a year or two or three on a single book, like Peter Maas or Gay Talese, have proven to the world that you don't have to pay these [criminals]—they'll tell you anyway, if you're a hardworking, honest journalist.' " [*quoting* Stein, Deputy Direc-

Prison inmates are also motivated to write in response to their crime and their confinement. Franklin, the author of *Prison Literature in America* (1989), *see* Pet. Br. at 37, n.29, writes: "[T]he earliest literature by convicted American criminals of which I am aware is purely confessional" (*id.* at 127); contemporary works by American prisoners are often written by " 'common' criminals . . . who became authors because of what they learned in prison." *Id.* at 181. Another commentator adds:

> There is another form of 'writing your way out of prison', . . . and that is the growing number of prison inmates who write, with instruction, as part of their rehabilitation. Writing contributes to a process of internal growth and acceptance of responsibility, many professionals believe, although it may not help ex-inmates to make a living, or make a statement.

---

tor of the National Organization for Victim Assistance]); Lieberman and Stewart, *Making Money Off Murder*, Student Law., Feb. 1982, at 41, quoting Lawrence Schiller, who negotiated the rights to the story of Gary Gilmore ("The simple fact is that money in such cases [of notorious criminals] is rarely important to the people whose story may be of value, the perpetrators of celebrated crimes. . . . 'Now their lawyers do it for the money and their agents do it for the money. But they are in the state of mind where the enormity of what they did has altered their perceptions on everything.' "); *Donald Harvey: Pitiless Killer*, The Columbus Dispatch, March 17, 1991 at 4F (jailhouse interview with Ohio's "most prolific murderer" discussing his serial killings); *State Invokes 'Son of Sam' Law*, St. Petersburg Times, March 12, 1991 at 6B (discussing lawsuit against convicted spouse-killer Edythe Robinson for the profits from her book, *A Long Lonely Time*—" 'My intention for writing the book was to find out who killed my husband', said Mrs. Robinson"); Nichols, '*What the Hell's a Guy Gonna Do*?', U.S.A. Today, Jan. 9-11, 1987, at 1A, col. 3, 2A col. 1 ("[convicted criminal Roswell] Gilbert [TV movie *Mercy or Murder*?] is not interested in money. He wants only to be vindicated. 'They couldn't accept the fact that I did what I did for a damn good reason,' he says."); Mark David Chapman [*see supra* note 27] entered into a contract in which he agreed that he did not wish to profit from his crime story. *In the Matter of a Contract between Mark David Chapman et al.*, Final Determination and Order (New York State Crime Victims Board), May 26, 1989.

Israel, *Jack Henry Abbott, American Prison Writing, and the Experience of Punishment*, 10 Crim. Just. & Behav. 441, 450 (1983).

Even some criminals who wish to be paid for speaking will be encouraged to speak by the incentives in New York's statute. *See* discussion above at p. 7. Petitioner argues that since the criminal cannot receive his profits for many years, the statute necessarily deters authors who must devote years to writing to speak. Pet. Br. at 10. However, "[w]hile authors may generally rely on contract advances to cover their research and other preliminary expenses, the criminal has no similar need for funds in advance of publication, because he typically sells only his rights to his story, not his services as author. In practice, a paid ghostwriter commonly pens the criminal's story." Okuda, *Criminal Antiprofits Law*, *supra* p. 8, at 1365 (footnotes omitted).

Petitioner asserts that its record of "[u]ndisputed affidavits containing specific examples of works that have not been published at all and of works that have been bowdlerized," cannot be dismissed as " 'conjectural' or 'speculative.' " Pet. Br. at 19. The record, however, contains no statement by any criminal speaker and only a few references to *criminals* being discouraged from speaking. *See* JA 21, 27-28, 45-46 and discussion above at pp. 14-16. On the other hand, the record and examples from the public record demonstrate that since New York's law was enacted, books, newspaper and magazine articles written by or with the cooperation of criminals about their crimes have been published and criminals have discussed their crime story in other media contexts as well. JA 137-138, ¶ 41 and discussion at notes 10, 11, 12, 23, 25 and 27.

In light of this record, it is clear that the statute will not deter a willing criminal from speaking and "the inhibiting effect" of the statute on those criminals who wish to be paid for speaking and on the media's willingness to disseminate the criminals' message "are . . . to a great extent speculative." *Branzburg v. Hayes*, 408 U.S. 665, 693-694 (1972) (footnote omitted). Petitioner can not, therefore, satisfy its burden of demonstrating that the statute is invalid on its

face. It is well-established that to prevail on its facial challenge on First Amendment grounds, petitioner "*must* demonstrate that the challenged law . . . 'could never be applied in a valid manner' . . . ." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988), *quoting Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984) (emphasis added); *see also Joseph H. Munson Co.*, 467 U.S. at 967-968 and cases cited therein. Petitioner has not only failed to show the extent to which criminals who wish to be paid will be deterred from cooperating in book projects, but it has also failed to show that the statute substantially deters speech in all its applications.

B. Exec. Law § 632-a Does Not Single Out Or Impose A Differential Burden On The Press Since The Statute Is Directed At Any Entity That Contracts With A Criminal And It Does Not Prevent Such Entity From Disseminating The Criminal's Message

Petitioner argues that Exec. Law § 632-a violates the First Amendment because it imposes a "differential regulation" on the press. Pet. Br. at 21. However, the cases striking down differential treatment of the press have been concerned with a specialized tax which "is directed at, or presents the danger of suppressing, particular ideas." *Leathers v. Medlock*, 59 U.S.L.W. 4281, 4285 (April 16, 1991). In this case the statute is neither directed at nor presents the danger of suppressing speech.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (Pet. Br. at 21-22), the Court considered whether Minnesota had the "power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." *Id.* at 576. At issue in *Minneapolis Star* was a use tax on the cost of paper and ink products used in publishing newspapers which fell disproportionately on Minneapolis Star which paid roughly two-thirds of the revenue raised by the tax. *Id.* at 578. The Court observed that the First Amendment does not

prohibit general economic regulation of the press, including a general tax. *Id.* at 581, 583.

However, the Court also reasoned that "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." *Id.* at 585. Because a tax on the press has the potential to inhibit, and ultimately, to prohibit publication, any differential tax places a substantial burden on the press (*id.*), and suggests an effort to "suppress the expression of particular ideas or viewpoints." *Leathers v. Medlock*, 59 U.S.L.W. at 4283. The Court struck down the specialized use tax in *Minneapolis Star* because it was not narrowly tailored to a compelling justification. *Id.* at 586-90.

In comparison, Exec. Law § 632-a is not a specialized tax directed at the press but is an attachment provision which only affects the criminal speaker's financial incentive to speak. Unlike a tax, section 632-a does not prevent the press from disseminating the willing speaker's message. Therefore, it does not operate in a manner that suggests an effort to suppress speech.

The Court in *Minneapolis Star* was also concerned that differential treatment of a small segment of the press suggests that the government's purpose is to restrict publication for those entities. *Id.* at 591-592; *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating a sales-tax scheme which targeted a small group within the press based upon content).[35] The statutes at issue in *Minneapolis Star* and *Arkansas Writers' Project* taxed a few newspapers and magazines, and therefore, had the effect of imposing "a penalty

---

35 *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("The tax here involved [2% of gross receipts of periodicals with a circulation of more than 20,000 copies] . . . is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (" 'plain purpose' [of tax in *Grosjean*] . . . was to penalize the publishers and curtail the publication of a selected group of newspapers.")

for a few." *Minneapolis Star*, 460 U.S. at 592; *Arkansas Writers' Project*, 481 U.S. at 229, and n.4. On the other hand, a broad-based tax which does not single out a small segment of the media for differential treatment does not raise the same additional concerns. *Leathers v. Medlock*, 59 U.S.L.W. 4281 (upholding general sales tax that covers all cable television companies but exempts newspapers and subscription magazines).

Exec. Law § 632-a is similar in scope to the tax upheld in *Leathers* since it is not directed at the press alone, or even at the media alone, as it applies whenever criminals contract with *any entity*. Exec. Law § 632-a(1). The justification for singling out entities that contract with criminals for speech about their crime is the need to have an effective mechanism to ensure that the criminal's asset derived from his crime story is maintained for the victims of that crime. *See* discussion below at pp. 43-45.

C. Since Exec. Law § 632-a Does Not Limit A Criminal's Speech About His Crime, And Is Justified Without Reference To The Discussion Of The Crime, It Is Neither A Content-Based Nor Speaker-Based Prohibition Or Penalty On Speech

Contrary to petitioner's argument, Exec. Law § 632-a is neither a content-based nor speaker-based prohibition or penalty on speech. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Exec. Law § 632-a does not, in any way, prohibit or limit discussion of crimes or of the criminal's point of view about them. Moreover, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* The purpose of Exec. Law § 632-a is directed not at content but at ensuring that the criminal does not profit from his crime before his victims are compensated.

The cases cited by petitioner striking down content-based statutes are distinguishable from section 632-a because each of the laws challenged in those cases imposed a burden on speech or publication through a tax or prohibition of speech that was directly related to content. Pet. Br. at 23.[36] The statute in this case does not require the Board to "evaluate the nature of the message being imparted in order to enforce [it]." *Regan v. Time, Inc.*, 468 U.S. at 656. The Board makes no inquiry as to whether the subject matter is offensive or whether the point of view expressed is unpopular. *See e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963). The Board simply considers several objective factors to see if the statute applies to the money earned by a particular speaker with respect to a particular contract; it "does not employ a sliding scale to determine if the crime spoken of is more horrible than another." 724 F. Supp. at 178 (40a).

Moreover, section 632-a does not attempt to dictate the persons who may speak about crime. Any person may discuss the crime under this statute. The only constraint the law imposes is that the criminal speaker who chooses to reenact or discuss his crime may not profit before his victim. Therefore, the statute "does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'. . . ." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48-49 (1986), quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. at 95-96. *See also Leathers v. Medlock*, 59 U.S.L.W. at 4285 (differential burden on speak-

---

36 *See, e.g., Arkansas Writers' Project*, 481 U.S. 221 (magazines containing general interest articles were fully taxed while religious, professional, trade and sports journals were exempted); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984) (photographic reproductions of currency prohibited but educational, historical or newsworthy reproductions exempted); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 99-101 (1972) (prohibition for all peaceful picketing near school with an exception for picketing that involves a labor dispute).

ers does not raise First Amendment concerns unless it "presents the danger of suppressing, particular ideas."); *St. Martin's Press*, N.Y.L.J., Feb. 26, 1990 at 25, col. 5 ("The law is not speaker based as the criminal-author is free to state his viewpoint, whatever that may be.")[37]

Section 632-a is also a content-neutral statute because the statute is " '*justified* without reference to the content of the regulated speech.' " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 48 [citations omitted] (emphasis in original). As this Court reiterated in *Ward v. Rock Against Racism*, 491 U.S. at 791: "The government's purpose is the controlling consideration." (*Renton* analysis applied to uphold New York City's sound-amplification guidelines at the Bandshell in Central Park). *Compare* Pet. Br. at 25 ("That decision [*City of Renton*] . . . has never been determinative in this Court in any subsequent case. . . .")

The Legislature's purpose in enacting section 632-a was to redistribute the criminal's profits from selling his crime story to his victims. The content of the criminal's speech was related to that justification only insofar as the Legislature determined that it was unjust to allow criminals to *profit* from storytelling about their *crimes* before their victims are compensated for their injury and suffering. *See* discussion above at pp. 8-9. The statute is, therefore, *justified* without reference to the content of the criminal's speech.[38] The *Renton* analysis is thus particularly appropriate here.

---

37 In the speaker-based cases cited by petitioner (Pet. Br. at 23 and n.19), the Court invalidated statutes that violated the fundamental principle against speaker-based and content-based regulations because they prohibited dissemination of expressive activity and were content-related as well as speaker-based. *See e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute prohibited noncommercial educational broadcasting stations from editorializing); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978) (statute banned corporations from communicating their views to the public on certain referendum subjects).

38 Petitioner asserts that the Board has justified the statute based on its content by references in prior briefs to the effect of the criminal selling his story on his victims. Pet. Br. at 24. However, it is clear from the legislative history and the Board's prior discussion of that history that the second victimization theory is based upon the criminal *profiting* from discussion of the crime and not from discussion of the crime itself. *See, e.g.*, Board Reply Mem. in Support of Cross-Motion for Summary Judgment at 30-31, 34: "[c]rime victims and their families who suffer a second violation when a criminal *sells* the story of his crime to the media. . . ." (emphasis added); "[i]t is abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive *large sums of money* for his story." JA 102 (emphasis added). Nothing in the Board's statements were meant to suggest that the Legislature's justification for the statute was the impact of the speech itself upon the victims, because the language of the statute and the legislative history make it explicit that "the overriding purpose of the bill, was to *compensate* the victims of crimes that are publicized in the media." Respondents' Brief in the Second Circuit at 10 (emphasis added). *Accord Children of Bedford*, 1991 WL 70950 at 14-15.

D. Exec. Law § 632-a's Minimal Impact On Freedom Of Speech And The Press Is Outweighed By The Substantial State Interest It Promotes

As the district court held, Exec. Law § 632-a imposes only an *incidental* burden on speech and, therefore, the four part test set forth in *United States v. O'Brien*, 391 U.S. at 377, should be used to determine whether the statute violates the First Amendment. As will be shown, under the *O'Brien* test Exec. Law § 632-a should be upheld.

As set forth above, the statute imposes only an incidental limitation on speech, within the meaning of *O'Brien*, because it only directly regulates conduct, i.e., the financial transaction between the criminal and some entity. The conduct that the statute regulates has an incidental effect on speech because the contract involves paying money to a criminal for speaking about his crime, but it is not inextricably intertwined with speech or a direct burden on speech because, as we have shown, attaching the criminal's profits is not a barrier to the criminal's speech as the law does not prevent a willing criminal from speaking. Moreover, as noted above at pp. 3-4, the law applies to money paid a criminal under a contract even where the work is not produced.

Since *O'Brien* applies where " 'speech' and 'nonspeech' elements are combined in the same *course of conduct*," 391

U.S. at 376 (emphasis added), it should apply here. Under the *O'Brien* test, an incidental infringement on First Amendment interests can be sustained:

> if [the statute] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

Applying the four *O'Brien* factors to Exec. Law § 632-a, it is apparent that petitioner's First Amendment rights have not been infringed. First, it is undisputed that New York has the constitutional authority to enact a law which enables victims (or their heirs) to obtain compensation from the assets of criminals by attaching their profits and then satisfying a civil court judgment out of the money being held in escrow. "[A]side from its impact on speech," [*Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 298-299 (1984)], petitioner has conceded that there would be no constitutional infirmity if section 632-a operated in the same way as do New York's general attachment and enforcement of judgment laws. Pet. Br. at 29 ("legislatures have broad powers to enhance existing generally applicable victim compensation remedies. . . .") (footnote omitted).

Second, Exec. Law § 632-a furthers a substantial governmental interest. New York has a substantial and compelling interest in making certain that criminals do not profit from discussing or reenacting their crimes before their victims have an opportunity to be compensated from those profits. This interest is derived from a common law principle "with roots deeply fastened in universal sentiments of justice," [B. Cardozo, *The Nature of The Judicial Process* at 41], that no person should profit from his own wrongdoing. *See also* 916 F.2d at 782 (13a); *Cf. Caplin & Drysdale*, 491 U.S. at 630 (governmental interest in depriving criminals of economic powers derived from their criminal activity); *Landau v. Vallen*, 895

F.2d 888, 891 (2d Cir. 1990) ("All things being equal, we believe courts in the civil context should be particularly sensitive to the rights of the victims of crimes when they seek compensation from those accused of inflicting their injuries.")

It offends society's sensibilities and sense of fairness when a criminal seeks to profit by capitalizing on his criminal activity while his victims are unable to recover financially for their injuries. As the N.Y. Court of Appeals eloquently stated in its opinion in the *Children of Bedford* case:

> Our laws are formulated to express not only the community's standards of right and wrong, but also its views on the nature and the gravity of the wrong. To the extent that the law manifests those standards, respect for it is maintained. To that end, our statutes impose on those convicted of crime punishment and disabilities which reflect the nature and extent of the community's denunciation of particular conduct. . . . Section 632-a embodies the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims. Thus, the statute is a codification of the fundamental equitable principle that criminals should not be permitted to profit from their wrongs . . . and an expression of the penological concept which provides that victims expect and are entitled to 'retributive satisfaction' from our criminal justice system . . . .

Children of Bedford, 1991 WL 70950 at 15 (footnote and citations omitted).

Exec. Law § 632-a applies this equitable principle to current societal conditions to provide victims of crimes being reenacted or discussed in the media with a *meaningful* opportunity to recover for their injury and suffering *before* the criminal profits from storytelling about the crime. Section 632-a therefore furthers New York's compelling interest because it "preserve[s] the victim's equitable right to assets earned by a criminal as a result of the victimization . . . .

[T]he victims who have been injured by the criminal act, and the State, which has been called upon to render aid to those victims, should have the first claim to that money." *Children of Bedford*, 1991 WL 70950 at 14.

Exec. Law § 632-a also satisfies the third *O'Brien* factor because the statute is content-neutral and the interests furthered by the statute are *unrelated* to the suppression of free expression. The Second Circuit correctly determined that "[t]he purpose of the statute . . . is not to suppress speech but to assure that funds are set aside out of profit . . . ." 916 F.2d at 783 (15a). *Accord Children of Bedford*, 1991 WL 70950 at 25 n.2 ("The statute's purpose is to compensate crime victims not to protect their sensibilities or those of the public, by restricting offensive speech." [citation omitted]) Indeed, as discussed at p. 7, the statute contains several incentives to encourage the criminal to speak. Petitioner's argument that the statute is related to the suppression of free speech "because the very purpose of the statute was to reflect the public's 'abhorrence' at particular exercises of First Amendment rights" (Pet. Br. at 27), is not supported by the language of the statute or its legislative history.[39]

Fourth, the substantial governmental interest supporting Exec. Law § 632-a "would be achieved less effectively absent the [statute]." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The standard to be applied here is not a least-restrictive analysis test. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. at 800.

By attaching only the criminal's profits from storytelling about his crime, the statute serves the state's interests in a

39 Petitioner attempts to look at the motives behind the Legislature's actions but, as *O'Brien* cautions, the Legislature's motive is irrelevant. 391 U.S. at 383. *See also City of Renton*, 475 U.S. at 47-48. In any event, it is clear that the Legislature's motive was to prevent the criminal from profiting from his crime before his victims were compensated, not to deter his speech.

manner that is not substantially broader than necessary. The criminal's insights into his own crimes have become, in today's mass media society, a valuable asset for which large sums of money are often paid. *See supra* note 10. By limiting the reach of the statute to the criminal's *profits* from discussion or reenactment about his own crime, and then only *attaching* the profits for the benefit of the particular victims of that crime to allow the victims to come forward and obtain a civil judgment against those assets, the statute achieves New York's important interest in a manner that is most effective and does not unduly burden free speech. The priorities for paying money out of the escrow account (Exec. Law §§ 632-a[8], a[11]), are also essential to achieving the state's objective since the victim is given priority over the criminal (except for a portion of his legal fees) and other judgment creditors who are not entitled to the benefit of the special statute of limitations provision. *Compare* Pet. Br. at 6.

Petitioner argues that the statute is not necessary to serve New York's compelling interest because there are a range of victim compensation remedies already available under New York law, and if those remedies are inadequate, the solution is to expand existing remedies, not adopt a specialized attachment statute directed only at profits from speech. Pet. Br. at 32-33.[40] There is no doubt, however, that existing remedies

40 In support of its argument that Exec. Law § 632-a is unnecessary and has been applied arbitrarily, petitioner refers to dicta contained in the Board's determination in the case involving the subway gunman, Bernhard Goetz. *In Re Bernhard Goetz* (New York State Crime Victims Bd.) (March 17, 1988), *slip op.* at 8. Pet. Br. at 32. The Board had determined that any money received by Goetz for his story of the events arising out of the subway shooting would not be subject to the statute. The Board's comment regarding the procedures available to litigants pursuant to the CPLR was merely an acknowledgment that a determination that section 632-a does not apply does not necessarily leave a civil litigant without remedy, but only without the special remedy in this statute, and that section 632-a does not supplant any other available existing remedies in the CPLR. With respect to the merits, as the district court held, "[t]he Board's determination that section 632-a did not apply to Bernhard Goetz was consistent with his acquittal on all counts but one—criminal possession of a weapon in the third degree, a class D felony. Penal L. § 265.02(4)." 724 F. Supp. at 180 (44a).

do not protect and can not be expanded to protect the rights of many crime victims who are covered by this statute.

The provisional remedy of attachment contained in Article 62 of the CPLR (McKinney 1980) can provide a plaintiff with a means of securing a defendant's property from which to satisfy a judgment. However, the plaintiff must seek an order of attachment and, to prevail, the court, exercising its discretion, must conclude that the plaintiff is likely to succeed on the merits and that the defendant is a non-domiciliary, a resident who can not be served or someone who has attempted to assign, dispose of, or secret property with the intent to frustrate enforcement of a judgment. CPLR §§ 6201(1),(2), (3).

An expanded Article 62 would not be as effective as section 632-a in providing crime victims with a meaningful opportunity to be compensated *before* the criminal profits from storytelling about the crime. Under Exec. Law § 632-a, a criminal's profits under a contract for the crime story can be secured before a victim even learns of the contract.[41] The entity contracting with the criminal is on notice, by the terms of the contract and then by the resulting work, that it is paying money to a criminal for his crime story and the entity is, therefore, best situated to pay that money over to the Board for the benefit of the victims of that crime. The general attachment remedy neither affords a plaintiff notice of the existence and location of attachable property, nor ensures that such property will be secured until the plaintiff takes steps to enforce the order of attachment.

In addition, expanding Article 62 would not address the cause of action, statute of limitations, and priority features

---

41 The resulting product of a contract for the crime story may not be completed for considerable time after payment under the contract has occurred. For example, *Wiseguy* was published in 1985. JA 51, ¶ 10. Henry Hill had by this time already received, and may have dissipated, nearly $100,000 that he was owed under the contract. JA 90-91. Therefore, one of Hill's victims, Patricia Eisenberg, who learned of her husband's murder and Hill's criminal involvement after *Wiseguy* was published, JA 125, did not know of the existence of attachable property *before* the criminal had considerable time to dissipate the money.

contained in section 632-a. As the New York Court of Appeals noted:

> Even if the attachment laws were expanded to provide a remedy for crime victims, the provisions necessarily would operate much like Executive Law § 632-a if the statute was to serve the State's compelling interests by escrowing certain types of funds belonging to the criminal, extending the statute of limitations and ordering priorities.

Children of Bedford, 1991 WL 70950 at 17.

Similarly, expanding the remedies served by New York's general restitution statute or other victim compensation schemes would not be a substitute for section 632-a and achieve the specific purposes served by the statute. Restitution would not prevent criminals, such as Hill, from profiting from their crimes. Restitution under New York Penal Law § 60.27 (McKinney 1987) is a component of the criminal sentencing scheme. As such, restitution applies only to convicted criminals. *See also* 18 U.S.C.A. § 3681 (West Supp. 1991) (federal collateral profits of crimes restitution order applies only to convicted persons). If a criminal were to sell the story of his crime while awaiting trial, the money could be dissipated before a restitution order could be entered. Although restitution orders may be imposed upon a defendant who is indigent at the time of sentencing, *see e.g.*, *Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974); *United States v. Brown*, 744 F.2d 905 (2d Cir. 1984), such orders will be difficult to enforce. Overburdened courts and probation departments are reluctant to become collection agencies for victims. Project, *Restitution Provisions of the VWPA*, *supra* note 8, at 572.

E. Section 632-a Is Also Necessary To Serve And Narrowly Tailored To Achieve New York's Compelling Interest In Ensuring That Criminals Do Not Profit From Their Crimes Before Their Victims Are Compensated

Even assuming that Exec. Law § 632-a imposes a direct and substantial, rather than an incidental, burden on speech,

the statute should still be upheld. A statute that substantially burdens freedom of speech or the press will be upheld if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest. *See, e.g., Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. at 637; *First National Bank of Boston v. Bellotti*, 435 U.S. at 786.[42] As both the Second Circuit and the N.Y. Court of Appeals have held, Exec. Law § 632-a survives such scrutiny.

New York has a compelling interest in ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries, and the statute is necessary to serve the state's compelling interest because it provides the most effective means of ensuring that crime victims are compensated whenever the criminal profits from telling the story of his crime. *See* discussion above at pp. 40-45. Also, under this statute, criminals are not even deprived of their profit "but merely restrained from disposing of it. . . ." *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (discussing pre-conviction restraint of forfeitable assets). *Compare* Pet. Br. at 39.

Petitioner argues that the asserted state interest renders "strict scrutiny toothless" because it describes "the state's interest in terms that precisely mirror what the statute does . . . ." Pet. Br. at 42. Petitioner argues that New York has the same interest in ensuring that "until their victims are

---

42 Petitioner states that New York must prove the necessity for its compelling interest, especially since other remedies exist to benefit victims of crime. Pet. Br. at 27-28, 32-33. However, there is no requirement that the state legislative record evince reasons to uphold its law as long as the state, as here, articulates reasonable and common sense explanations for the law that can survive scrutiny. *See, e.g., Austin v. Michigan Chamber of Commerce*, ____ U.S. ____, 110 S. Ct. 1391, 1398 (1990) ("State has *articulated* a sufficiently compelling rationale. . . ." (emphasis added); *Minneapolis Star*, 460 U.S. at 580 n.3 (absence of any evidence of legislative intent from the legislative proceedings did not preclude Court from determining whether state's justifications for law were narrowly tailored). In any event, the legislative record before the Court is sufficient to justify the interest served by New York's statute.

compensated, criminals will be denied the enjoyment of all assets, . . ." *Id.*

Petitioner's argument that a state can not define the interest in terms of what the statute does is incorrect. Section 632-a was enacted to benefit a special category of victims, the victims of those criminals who seek to profit by telling the story of their crime, and to ensure that such criminals do not profit from their crime *before* these victims are compensated out of the criminal's asset. This compelling interest stands on its own footing and supports the statute's distinctions. *Cf. Austin v. Michigan Chamber of Commerce*, 110 S. Ct. at 1397, 1398. *Compare* Pet. Br. at 31-32, 37-39.

The statute is narrowly tailored to achieve New York's compelling interest because its scope and operation are precisely targeted to its objective. As the New York Court of Appeals concluded, "[t]he reach of the law is limited to its purpose." *Children of Bedford*, 1991 WL 70950 at 20.

Petitioner argues that the statute's distinctions are not necessary or narrowly tailored to achieve a compelling state interest because the statute is both under-inclusive and over-inclusive. Pet. Br. at 27-44. Petitioner argues that the statute is under-inclusive because it applies only to a criminal's assets from speaking about his crime and not to all assets of the criminal, including assets derived from speech on topics other than the crime. Pet. Br. at 31, 41.

Section 632-a was not intended to compensate *all* crime victims, to attach *all* of the assets of *all* criminals or to prevent criminals in general from profiting from their crimes. As the New York Court of Appeals concluded: "The statute was never intended to reach profits received solely as a result of the criminal's notoriety. . . . That financial success is the result of their newly advertised expertise or prominence, not their illegal act. . . . Monies received by a criminal from inheritance or other sources do not relate to the crime in which a victim has been injured." *Children of Bedford*, 1991 WL 70950 at 18.

The state's compelling interest is to prohibit a criminal from profiting *from his crime* at the expense of his victims. As the Second Circuit recognized, 916 F.2d at 783 [15a],

apart from the proceeds obtained by committing the crime itself, there is virtually no other way in which a criminal profits *from his crime* at the expense of his victims than by being paid for reenacting or discussing the crime.

> The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

916 F.2d at 784 (17a). Therefore, the statute is not under-inclusive because few victims benefit from this statute and because criminals can still profit from their crimes if they write about other subjects or any money remains in the escrow account.

Next, petitioner argues that the statute is under-inclusive because it applies to speech about the crime even where the criminal is paid for the time he has devoted to a project of literary value and not to exploit the crime in the media. In petitioner's view, payments of royalties to authors can never constitute profits from crime. Pet. Br. at 34-37. Alternatively, petitioner argues that the statute is over-inclusive because it applies to the entire profits from a book even where the crime is an incidental part of a story which principally involves a topic other than the crime. Pet. Br. at 40-41.

Exec. Law § 632-a does not vest the Board with discretion to examine the content of the criminal's speech to determine if the crime is a major or minor part of the story, nor is the Board able to determine whether a criminal is being paid because of his storytelling about the crime as opposed to the literary value of his story or the hours of work he has devoted to it. As the district court determined, the Board's inquiry is an objective one which evaluates whether there is a contract under which the criminal will be paid and whether the story includes reenactment or discussion of the crime. 724 F. Supp. at 177-8 (39a-40a).

Even if the criminal is paid more for his labors than for his notoriety, the criminal is still *profiting from his crime* and victims of that crime should first be entitled to be compensated for their injury and suffering. New York has a compelling interest in ensuring that criminals do not profit from their crimes before their victims are compensated *under any circumstances*. "Th[e state's] interest requires that the entire proceeds due the criminal be available to the victim, whether or not the victim's story is a small or large part of the book." 916 F.2d at 784 (17a-18a). *See also Children of Bedford*, 1991 WL 70950 at 18 ("criminals covered by th[is] statute . . . create, by illegal activity, a new product—a story—which becomes profitable in the retelling."); *cf. United States v. Monsanto*, 491 U.S. at 610 ("Congress . . . adopted a provision for the special forfeiture of collateral profits (e.g., profits from books, movies, etc.) that a convicted defendant derives *from his crimes*." [emphasis added]). The degree of tailoring of the state's interest may also take account of the fact that criminals have committed a crime and that society may impose certain restrictions on their ability to profit from that crime.

CONCLUSION

For all of the above reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
May 29, 1991

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

O. PETER SHERWOOD
Solicitor General
of the State of New York

HOWARD L. ZWICKEL*
Assistant Attorney General
In Charge—Litigation Bureau

SUSAN L. WATSON
Assistant Attorney General
Of Counsel

* *Counsel of Record*